

LARRY HISTON,	)	No. C 11-5210 JSW (PR)
	)	
Plaintiff,	)	<b>ORDER GRANTING MOTION</b>
	)	<b>FOR STAY AND FOR</b>
vs.	)	<b>EXTENSION OF TIME;</b>
	)	<b>DENYING MOTION FOR</b>
KELLY MITCHELL,	)	<b>LEAVE TO AMEND</b>
	)	
Defendant.	)	<b>(Docket No. 20, 21, 22, 25)</b>


Plaintiff's motion for leave to amend was not entered on the docket until the same day that Defendant filed his motion to dismiss. Consequently, Defendant's motion to dismiss only addresses the original complaint, not the proposed amended complaint or Plaintiff's request to file the amended complaint. Ordinarily leave to file the amended complaint would be granted under Federal Rule of Civil Procedure 15(a). However, the proposed amended complaint sets forth the same claim regarding access

1 to courts as the original complaint; the only change Plaintiff wants to make is to add a  
2 new form of relief. Therefore, if Defendant's argument in his motion to dismiss that  
3 the claim is not cognizable is valid, the proposed amended complaint would be an  
4 exercise in futility because it be asserting an invalid claim. Consequently, the Court  
5 will resolve the arguments in the motion to dismiss first, and then, if the motion to  
6 dismiss is denied, grant Plaintiff leave to file the amended complaint.

7 Accordingly, Plaintiff's motion for leave to file an amended complaint is  
8 DENIED without prejudice to the Court's sua sponte reconsideration if and when  
9 Defendant's motion to dismiss is denied. (Docket No. 20.) Plaintiff's motion to  
10 replace a page of the proposed amended complaint is GRANTED. (Docket No. 21.)  
11 Defendant's motion to stay discovery is GRANTED and discovery is STAYED until  
12 Defendant's motion to dismiss is resolved. (Docket No. 22.) Plaintiff's motion for an  
13 extension of time, to and including April 25, 2012, in which to file an opposition to  
14 Defendant's motion to dismiss is GRANTED. (Docket No. 25.) No further extensions  
15 of time will be granted. Defendant **shall** file a reply brief within **14 days** of the date  
16 the opposition is filed.

17 IT IS SO ORDERED.

18 DATED: April 9, 2012

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21 JEFFREY S. WHITE  
22 United States District Judge  
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28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LARRY HISTON,

Plaintiff,

v.

KELLY MITCHELL et al,

Defendant.

Case Number: CV11-05210 JSW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 9, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Larry Histon J-79124  
1N/89L  
San Quentin State Prison  
San Quentin, CA 94974

Dated: April 9, 2012



Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk